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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-6790

WALDO GRANBERRY,

Petitioner,

vs.

LARRY NIZELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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ATTORNEY FOR PETITIONER

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The Petitioner, Waldo Granberry, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered herein on December 26, 1985.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit entered on December 26, 1985, is reported as Granberry v. Mizell, 780 F.2d 14 (7th Cir. 1985). The order denying the Petition for Rehearing is unreported. The Memorandum and Order entered by the District Court on April 18, 1984 is not reported. Each of the decisions is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The original habeas corpus petition was filed pursuant to 28 U.S.C. §§2241 and 2254. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 26, 1985. The petition for rehearing and suggestion for rehearing in banc was denied on February 28, 1986. This petition for certiorari is filed within ninety (90) days of that date, vesting jurisdiction in this Court pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the state's failure to raise the issue of non-exhaustion of state court remedies in the District Court foreclose consideration of that issue on appeal in a federal habeas corpus petition brought by a state prisoner pursuant to 28 U.S.C. §2254?

2. Did Petitioner exhaust his state remedies by presenting the issue raised in the federal petition to the Illinois Supreme Court and, in any event, would further recourse to the Illinois state courts be futile?

STATEMENT OF FACTS

Petitioner, Waldo Granberry, a resident of an Illinois correctional institution, brought this habeas corpus action pursuant to 28 U.S.C. §2254 in the United States District Court for the Southern District of Illinois. Petitioner claimed that the State of Illinois violated his constitutional rights by the application to his case of parole criteria adopted subsequent to his conviction. Prior to seeking federal relief, Petitioner filed a mandamus action in the Illinois Supreme Court raising the identical issue. That Court denied the petition "without prejudice to proceeding in any appropriate circuit court for consideration of the question presented." Petitioner sought no further relief in the Illinois courts and brought this federal habeas corpus claim.

Respondent raised no exhaustion question in the District Court, and the petition was denied on the merits. On appeal, Respondent for the first time in its brief, argued that Petitioner failed to exhaust his state court remedies. Petitioner responded by relying on earlier decisions of the United States Court of Appeals for the Seventh Circuit holding that the failure to raise exhaustion in the District Court constituted waiver of the issue.

The panel, specifically disagreeing with recent Seventh Circuit precedent and with recent decisions of three other circuits, decided that (1) the Illinois Attorney General could not waive the exhaustion issue; and (2) Petitioner had not, in fact, exhausted his state court remedies. The panel thus remanded the case to the District Court with direction to dismiss the petition for failure to exhaust state court remedies. Petitioner then filed a Petition for Rehearing and Suggestion for Rehearing in Banc. That Petition was denied. This Petition for Certiorari to the United States Court of Appeals follows.

REASONS FOR GRANTING WRIT

I

THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO RESOLVE AN ISSUE WHICH HAS SPLIT THE CIRCUITS AND THEREBY OBVIATE THE NEED FOR SUBSTANTIAL ADDITIONAL LITIGATION IN THE FUTURE

Pursuant to 28 U.S.C. §2254(b) (1976), a state prisoner must exhaust available state court remedies before seeking a habeas corpus writ in federal court. The Courts of Appeal are split on the issue of whether a state may waive the exhaustion requirement in a federal habeas corpus proceeding. The United States Courts of Appeal for the Fourth, Fifth, Eighth and Eleventh Circuits have ruled that the state may waive non-exhaustion, Jenkins v. Fitzberger, 440 F.2d 1188, 1189 (4th Cir. 1971); McGee v. Estelle, 722 F.2d 1206 (5th Cir. 1984) (in banc); Purnell v. Missouri Dept. of Corrections, 753 F.2d 703, 708-710 (8th Cir. 1985); Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983), cert. denied, 466 U.S. 962 (1984). The Courts of Appeal for the First, Third, Sixth and Ninth Circuits have precluded waiver, Peidel v. Scafati, 412 F.2d 761, 766 (1st Cir. 1969), cert. denied, 396 U.S. 861 (1969); United States ex rel. Trantino v. Hatrack, 563 F.2d 86, 96-98 (3rd Cir. 1977), cert. denied, 435 U.S. 928 (1978); Bowen v. Tennessee, 698 F.2d 241, 242-243 (6th Cir. 1983) (en banc); Batchelor v. Cupp, 693 F.2d 859, 962 (9th Cir. 1982), cert denied, 463 U.S. 1212 (1983). The Tenth Circuit held in Naranjo v. Richelts, 696 F.2d 83, 87 (10th Cir. 1982) that the state could not concede exhaustion. The position of the Second Circuit is unclear. In United States ex rel. Foster v. Festa, 513 F.2d 1313, 1314 n.1 (2nd Cir. 1975), cert. denied, 423 U.S. 841 (1975), the court indicated that the exhaustion requirement could not be waived. But in Colon v. Fogg, 603 F.2d 403, 407 (2nd Cir. 1979), the state's untimely attempt to raise the exhaustion issue was rejected as "close to frivolous." In the Seventh Circuit, the Granberry panel

sought to "disassociate" itself from the precedent holding that exhaustion may be waived, Heirens v. Mizell, 729 F.2d 449, 457 (7th Cir. 1984), cert. den., 83 L.Ed.2d 85, 105 S.Ct. 147 (1984).

With such an equal recent division among the Circuits, this is the type of issue which demands consideration by this Court. Without such consideration, the issue of whether a state may waive exhaustion will continue to consume the time of the federal bench. Furthermore, due to the importance of the federal question and the substantial number of federal habeas corpus proceedings brought each year by state prisoners, a uniform rule throughout the country is needed.

II

THE COURT OF APPEAL'S CONSIDERATION OF THE ISSUE PRESENTED WAS INADEQUATE AND INCORRECT

A. THE SEVENTH CIRCUIT'S DECISION IS NOT CONSISTENT WITH THIS COURT'S DECISION IN ROSE v. LUNDY

Petitioner respectfully submits that the Seventh Circuit in this case reached the incorrect decision on the question and misapplied this Court's decision in Rose v. Lundy, 455 U.S. 509 (1982). In Rose, the Court adopted a "total exhaustion" rule which requires a district court to dismiss a federal habeas petition filed by a state prisoner if it contains both exhausted and unexhausted claims. The issue of waiver was not presented nor decided in Rose.

In the instant case, the Seventh Circuit concluded that Rose required a court to consider the exhaustion issue sua sponte. Nowhere in Rose is there such a requirement or suggestion. Indeed, the Fifth Circuit setting in banc, joined the Eleventh Circuit in concluding that Rose did not preclude waiver and, in fact, that allowing the state's attorney general to waive exhaustion was most consistent with this Court's reasoning in Rose, McGee v. Estelle, 722 F.2d 1206, 1212 (5th Cir. 1984) (en banc); Thompson v. Wainwright, 714

F.2d 1495, 1505 (11th Cir. 1983). All that Rose v. Lundy requires is that the state should have an initial opportunity to pass upon the alleged violation of constitutional rights. The State of Illinois, through its chief legal officer, the Attorney General, has waived this opportunity by failing to raise the issue of non-exhaustion before the case was decided on its merits in the District Court.

B. THE EXHAUSTION REQUIREMENT IS NON-JURISDICTIONAL

Exhaustion of available state court remedies is not a jurisdictional requirement; it is merely a matter of comity, Preiser v. Rodriguez, 411 U.S. 475, 491 (1973) ("rule of exhaustion...is rooted in consideration of federal-state comity"); Fay v. Noia, 372 U.S. 391, 419-420 (1963), Bowen v. Johnston, 306 U.S. 19, 27 (1939). See also C. Wright, A. Miller and E. Cooper, 17 Federal Practice and Procedure, §4264 at p. 651 and n. 59 (1978). As Judge Tate recognized in Bufalino v. Reno, 613 F.2d 568, 570 (5th Cir. 1980): "The exhaustion rule does not relate to the jurisdiction of federal courts but rather addresses the appropriate exercise of that jurisdiction in light of our unique American system of dual sovereignty." In fact, the federal courts could not dispose with the exhaustion requirement, as they do when the state courts have had an opportunity to address the merits but fail to do so, if exhaustion were jurisdictional, Francisco v. Gathright, 419 U.S. 59, 63 (1974) (per curiam); McGee v. Estelle, 722 F.2d 1206, 1210 (5th Cir. 1984).

C. THE STATE'S ATTORNEY GENERAL IS EMPOWERED TO WAIVE EXHAUSTION

Nowhere in Rose is there the suggestion that the Attorney General of a state cannot act for the state and waive the right to have the question first presented in state court. As the Fifth Circuit noted in McGee:

> As the chief legal officer of the state, the attorney general is the appropriate person to assert, or to waive, the state's right first to determine a claim that the state is holding a person in custody in violation of his federal constitutional rights or statutory rights, at 722 F.2d 1212.

The Illinois Attorney General is a constitutional officer, Constitution of Illinois 1970, Article V, §15. He is given plenary authority by the Illinois General Assembly to represent the state and its officers, Chapter 14, Illinois Revised Statutes, Paragraph 4. If the citizens of Illinois are not satisfied with the manner in which the Attorney General is fulfilling his duties, they can remove him or not re-elect him. He has the power and authority to determine whether it is in Illinois' interests to have claims made initially in state or federal court. Nothing in Rose suggests that federal courts are to second guess representation provided by the attorney general and compel the enforcement of a non-jurisdictional rule of comity.

D. COMITY, FEDERAL LAW AND PUBLIC POLICY SUPPORT WAIVER

State waiver of the exhaustion requirement may be explicit or implicit, McGee v. Estelle, 722 F.2d 1206, 1213 (5th Cir. 1984). Jenkins v. Fitzberger, 440 F.2d 1188 (4th Cir. 1971), is an example of the former. In Jenkins, the state attorney general sought to waive the issue of exhaustion and have the case decided on its merits. Notwithstanding the state's waiver, the district court dismissed the petition for failure to exhaust all available state court remedies. The United States Court of Appeals for the Fourth Circuit reversed. The court reasoned that because the exhaustion requirement is a matter of comity, the federal courts may defer to the state's wishes and accept the waiver, Jenkins v. Fitzberger, 440 F.2d 1188, 1189 (4th Cir. 1971). In Thompson v. Wainwright, 714 F.2d 1495, 1504 (11th Cir. 1983), the Eleventh Circuit concluded:

> The nature of comity between national and state sovereignties in our federal system, as applied to the exhaustion doctrine in two-tier collateral review, necessarily implies power of the state to waive its right of initial review. Federal support of initial review in the state courts is not primarily to vindicate federal interests but in large measure arises out of deference to state interests. It is designed to protect the state courts' rule in the enforcement of federal law and prevent the disrupting of state judicial proceedings. Exhaustion is intended to give the state the opportunity for initial review. In particular cases, the state may decide that its role is better performed, and its judicial proceedings disrupted less, by foregoing the opportunity of initial review. (Citations omitted, original emphasis).

Closely related to the express waiver is the implied waiver, Rubin, Toward a General Theory of Waiver, 28 U.C.L.A. Law Rev. 478, 514-15 (1981) ("The principle of stage preclusion," a component of waiver, "demands that a right be asserted during the stage to which it is most relevant.") The state's failure to raise the issue of exhaustion in a timely fashion constitutes a waiver, McGee v. Estelle, 722 F.2d 1206, 1213 (5th Cir. 1984), Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983), Shaw v. Boney, 695 F.2d 528, 529 n.1 (11th Cir. 1983), Wesselt v. State of Alabama, 595 F.2d 247, 250-51 (5th Cir. 1979) (failure to raise the issues of non-exhaustion in the district court constitutes a waiver.)

Rose v. Lundy only requires that the state shall have the opportunity to initially review the alleged violation of constitutional and statutory rights. In the instant case, the State waived its opportunity by failing to assert non-exhaustion in its answer to the habeas corpus petition. Indeed, federal law compels such a conclusion. As stated by Judge Meritt, dissenting in Bowen v. Tennessee, 698 F.2d 241, 245 (6th Cir.) (en banc):

> Rule 5 of the rules governing habeas corpus cases in the District Court adopted by the Supreme Court on April 26, 1976, 28 U.S.C. Sec. 2254, requires the defendant to set out in its answer, its position respecting exhaustion of state remedies. Rule 11 of those rules makes the Federal Rules of Civil Procedure applicable. Rule 12(h), Federal Rules of Civil Procedure, provides that the failure to raise a defense other than subject matter jurisdiction shall constitute a waiver of the defense. The defendant by failing to raise the point below has

> waived its claim that a mixed petition should be dismissed.

The writ of habeas corpus is commonly known as the "great writ of liberty", Black's Law Dictionary 363 (5th ed. 1983); Bowen v. Johnston, 306 U.S. 19, 26 (1939) (Hughes, C.J.) (habeas corpus is a "precious safeguard of personal liberty"). Because of the prominent role that this writ plays in liberating unlawfully imprisoned persons, habeas corpus petitioners are entitled to the swift adjudication of their rights. The Respondent in this case has delayed the adjudication of the merits of this petition by more than thirty months by not raising an exhaustion question until the case had reached the appellate court. The Respondent's approach requires additional litigation in the state and federal courts. Such an approach entails the expenditure of additional time and money on the part of the state and Petitioner, the inefficient use of judicial resources, and delay before the merits of Petitioner's claim are addressed once again.

Furthermore, cases decided by the Court which are analogues to habeas exhaustion support waiver by the attorney general. For example, in Estelle v. Smith, 451 U.S. 454, 468 n.12 (1981), this Court refused to consider the issue of procedural default in state court as enunciated in Wainwright v. Sykes, 433 U.S. 72 (1977), because the state failed to raise it, see also, Comment, State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions, 50 U. Chic. L. Rev. 354, 370-376 (1983).

Petitioner respectfully submits that this Court should grant the instant writ and establish a uniform rule that by failing to assert the issue of exhaustion in the district court, the state therefore waives it.

III

IN ANY EVENT, PETITIONER EXHAUSTED HIS STATE COURT REMEDIES AND FURTHER RECOURSE TO THE COURTS OF ILLINOIS WOULD BE FUTILE

A. PETITIONER HAS EXHAUSTED HIS STATE COURT REMEDIES

Petitioner asserts that he has exhausted his state court remedies by presenting the identical issues raised in this federal habeas petition to the Illinois Supreme Court by way of petition for writ of mandamus. Under Illinois law, mandamus is the proper remedy to raise the issue, People ex rel. Abner v. Kinney, 30 Ill.2d 201, 195 N.E.2d 651 (1964). Petitioner has fairly presented his claim to the state courts and that is all this Court requires, Picard v. Conner, 404 U.S. 270, 275 (1971).

Although the Illinois Supreme Court denied the petition without prejudice to the Petitioner proceeding in the state trial courts, there is no requirement that the state court address the merits of the claim, Smith v. Digman, 434 U.S. 332, 333 (1978). Moreover, there is no suggestion that the Illinois Supreme Court denied the Petition for some procedural reason or denied the Petition other than on the merits.

In the instant case it was perfectly reasonable for the Petitioner to advance his claim directly to the Illinois Supreme Court, in view of the direct precedent against him in the Appellate Court having jurisdiction over the case, Harris v. Irving, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980). The Illinois Supreme Court might have remanded the case to a lower court for consideration, but it did not. It denied the Petition outright. The Petitioner has fairly presented his claim to the State's highest court, and it was rejected. That is all that is required.

B. FURTHER RECOURSE TO THE ILLINOIS COURTS WOULD BE FUTILE AND ANOMALOUS

Petitioner submits that exhaustion should not be required in the case because further recourse to the state courts of

Illinois would be futile. The Illinois Appellate Court having jurisdiction over Petitioner has directly ruled against him on the precise issue of whether the application of the new Illinois parole criteria acts as an ex post facto law as to offenses occurring while earlier criteria were being utilized, Harris v. Irving, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980), appeal denied, 82 Ill.2d 584 (1980). It would not only be a grossly inefficient use of judicial resources, but also futile to require this Petitioner to file a petition in the Circuit Court of Johnson County, Illinois (where he is confined), have that Court affirm on the basis of Harris, require Petitioner to appeal to the same Court which decided Harris, and finally require him to file a petition for leave to appeal to the Illinois Supreme Court.

Such a requirement would be manifestly inappropriate in this case because the law on the merits of Petitioner's claim has not come from the state courts, but from the United States Court of Appeal for the Seventh Circuit. Even if an Illinois Court were inclined to reconsider the holding in Harris, it would be faced with the direct, contrary, and recent authority of the Seventh Circuit in Heirens v. Mizell, 729 F.2d 449 (7th Cir.1984) cert. denied, 105 S.Ct. 147 (1984).*

Thus, whatever the merits of the question of waiver in this case, recourse to state court would be futile and should not be required.

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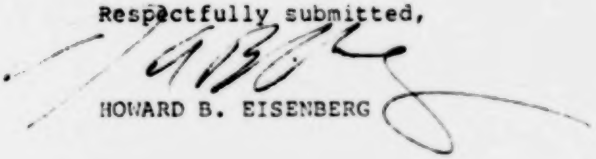
* On the merits, Petitioner vehemently asserts that the Court of Appeals incorrectly decided Heirens, and that the earlier decision of the Court in Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982) correctly resolved the question. Petitioner concedes that the merits of the question are not presently before this Court.

CONCLUSION

This case presents this Court with an excellent vehicle to establish a uniform rule that the state, through its chief legal officer, waives the issue of exhaustion if it is not asserted in the district court. For the reasons specified herein, Petitioner respectfully prays that a writ of certiorari to the United States Court of Appeal for the Seventh Circuit issue, that this Court give full consideration to the issues raised herein, and that the Court rule that the State has waived the exhaustion issue so that the Seventh Circuit may address the merits of Petitioner's claim.

Respectfully submitted,



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